UNITED MERCHANT FINANCE BHD

v.

MAJLIS AGAMA ISLAM NEGERI JOHOR

FEDERAL COURT, KUALA LUMPUR
CHONG SIEW FAI CJ (SABAH & SARAWAK)
EDGAR JOSEPH JR FCJ
MOHAMED DZAIDDIN FCJ
[CIVIL APPEAL NO: 02-7-97(J)]
22 MARCH 1999

CIVIL PROCEDURE: *Summary judgment - Appeal - Triable issues - Whether defence a mere denial - Issues on 'fraud' and 'constructive trustee' - Whether substantive issues of law - Whether complicated and technical in nature - Whether warranted a trial - Rules of the High Court 1980, O. 14, O. 14 rr. 1 & 3 - Rules of Supreme Court 1965 (UK), O. 14 r. 3*

CIVIL PROCEDURE: *Summary judgment - Appeal - Triable issues - Whether there 'ought for some other reason to be a trial' - Order 14 r. 3, Rules of the High Court 1980 - Scope of phrase - Whether to be invoked when there were circumstances that ought to be investigated in the interest of justice - Presence of third party to main action - Whether constituted 'some other reason' to warrant a trial*

CIVIL PROCEDURE: *Pleadings - Defence - Plea of fraud - Whether must condescend to particulars of alleged fraud*

WORDS & PHRASES: *"that there ought for some other reason to be a trial" - Order 14 r. 3, Rules of the High Court 1980*

The respondent ('the Majlis') had deposited RM1 million by way of fixed deposit with the appellants' Batu Pahat branch, and was issued with two fixed deposit receipts vide. receipts No. 209431 and 209451. The Majlis subsequently demanded for the refund of the RM1 million, but the appellants failed to comply. The Majlis thereupon sued the appellants ('the defendants') for the deposited sum and interest thereon, pleading that the defendants were liable to refund the money under the fixed deposit receipts, and alternatively, that they were liable as constructive trustees thereof. The defendants had filed their defence wherein they alleged that the fixed deposit receipts were issued without due authority or issued by way of fraud.

Following the Majlis's application for summary judgment, the learned judge ruled that *bona fide* triable issues had been established by the defendants, as: (i) the case was a complicated case and therefore merited a full trial; (ii) the issues of 'constructive trustee' and 'fraud' were substantive legal issues and must be examined at the trial; and (iii) there was a third party notice issued by the defendants on MUI Continental Insurance Sdn Bhd seeking an indemnity against the Majlis's claim, and this provided the court with "some other reason" to order a trial under O. 14 r. 3 Rules of the High Court 1980. On appeal, the Court of Appeal, however, took the view that this was a straightforward case and that the defendants had pleaded nothing more than a bare denial of the claim. The court, in consequence, allowed the appeal and entered summary judgment for the Majlis.

The defendants appealed and argued that the Court of Appeal had erred in concluding that the defence was only a bare denial, and in not considering the issue of constructive trustee. The facts also showed that, in the course of the appeal before the apex court, the parties came to be aware of a criminal case involving the Majlis's former President, namely the case of Federal Court Criminal Reference No. 06-3-1994, in which both the RM1 million deposit and the fixed deposit receipts No. 209431 and 209451 had featured in the evidence. That being so, a question further arose as to whether the said Federal Court Criminal Reference could have any bearing on the present appeal, and if so, whether the defendants should be allowed to examine the appeal record thereof, and to apply for amendments of their defence if necessary.

Held:

Per Mohamed Dzaiddin FCJ

[1] It is not correct to say that the presence of a third party to the present action would constitute 'some other reason' to warrant a trial. Third party proceedings are independent proceedings between a defendant as plaintiff and a third party as defendant, and a statement by a defendant that he is entitled to be indemnified by a third party is no answer to the plaintiff's claim in an O. 14 application, unless the third party has discharged the plaintiff's claim.

[2] Where fraud or dishonesty is material, it must be clearly pleaded, if not explicitly, then in such terms that there is no reasonable doubt as to what is being alleged. To plead, as the defendants did, that the two fixed deposit receipts had been issued without due authority or in fraud of the defendants, is not enough. It follows that there was no merit in the contention that there was sufficient plea of fraud in the defendants' defence.

[3] The Court of Appeal had clearly not discussed the constructive trustee issue. The learned High Court judge, in any case, was correct in the finding that the constructive trustee point as pleaded was a substantive legal issue which required close investigations. It is clear that the alternative cause of action that the defendants were liable as constructive trustees to the Majlis for the deposited amount requires a full trial of the matter. The onus is on the Majlis to prove that the defendants were in breach of their contractual duty of care to the Majlis.

[4] There are circumstances in the present appeal which constitute "some other reason to be a trial". First, the onus is on the Majlis to prove their claim, and it ought to be noted that the law on constructive trustee in the context of banker/customer relationship is quite complicated and technical in nature, so that, a claim based on it could only be properly proved by oral evidence. Further, the evidence about the two fixed deposit receipts No. 209431 and 209451 disclosed at the trial of the Majlis's former President could have a bearing on the present case. The receipts could be crucial to the defendants' defence and it is desirable, in the interest of justice, that the defendants be given every opportunity to examine fully the record of the criminal proceedings in question.

[Appeal allowed; order of Court of Appeal set aside; defendants given unconditional leave to defend action.]

*[**Bahasa Malaysia** Translation Of Headnotes]*

Responden ('Majlis') telah menyimpan RM1 juta melalui simpanan tetap dengan cawangan perayu di Batu Pahat, dan telah diserahkan dua resit simpanan tetap bernombor 209431 dan 209451. Majlis kemudiannya memohon untuk mengeluar balik simpanan RM1 juta mereka tetapi permohonan tersebut tidak dipenuhi oleh perayu. Berikutan itu Majlis mendakwa perayu ('defendan') untuk pemulangan jumlah yang disimpan beserta faedahnya, sambil memplid bahawa berdasarkan resit-resit simpanan tetap yang dikeluarkan, defendan adalah bertanggungan untuk membayar wang tersebut, dan secara alternatifnya bahawa defendan bertanggungan untuk membayar balik kerana mereka adalah pemegang amanah konstruktif wang tersebut. Defendan telah memfail pembelaan dan menyatakan bahawa resit simpanan tetap berkenaan telah dikeluarkan tanpa kebenaran atau telah dikeluarkan dengan cara fraud.

Ekoran permohonan Majlis untuk penghakiman terus, hakim yang bijaksana memutuskan bahawa defendan berjaya membuktikan isu-isu *bona fide* yang boleh dibicarakan, oleh kerana: (i) kes semasa adalah kes yang sukar dan dengan itu menuntut satu perbicaraan penuh; (ii) isu-isu 'pemegang amanah konstruktif' dan 'fraud' adalah isu undang-undang substantif yang mesti diteliti

dalam perbicaraan; dan (iii) terdapat notis pihak ketiga yang dikeluarkan oleh defendan ke atas MUI Continental Insurance Sdn Bhd menuntut indemniti terhadap tuntutan Majlis, dan ini memberi mahkamah 'some other reason' untuk memerintahkan perbicaraan di bawah A. 14 k. 3 Kaedah-kaedah Mahkamah Tinggi 1980. Bagaimanapun, atas rayuan, Mahkamah Rayuan mengambil pandangan bahawa kes semasa adalah satu kes yang senang difahami dan defendan sebenarnya hanya memplid 'a bare denial of the claim'. Mahkamah rayuan, dengan itu, membenarkan rayuan dan memberi penghakiman terus kepada Majlis.

Defendan merayu dan berhujah bahawa Mahkamah Rayuan telah khilaf bilamana merumuskan bahawa pembelaan hanyalah merupakan 'a bare denial', dan kerana tidak mempertimbangkan isu pemegang amanah konstruktif. Fakta juga menunjukkan bahawa, ketika rayuan sedang di dengar oleh mahkamah tertinggi, pihak-pihak di sini telah menyedari tentang satu kes jenayah yang melibatkan bekas Presiden Majlis, iaitu kes Rujukan Jenayah Mahkamah Persekutuan No. 06-3-1994, di mana kedua-dua RM1 juta dan resit-resit simpanan tetap No. 209431 dan 209451 menjadi sebahagian dari keterangan di dalamnya. Dengan itu, persoalan lanjut telah berbangkit berhubung samada Rujukan Jenayah Mahkamah Persekutuan tersebut boleh mempengaruhi rayuan semasa ini, dan jika demikian, samada defendan patut dibenarkan memeriksa rekod rayuan tersebut, dan memohon untuk meminda pembelaan mereka jika perlu.

Diputuskan:
Oleh Mohamed Dzaiddin HMP

[1] Adalah tidak benar untuk mengatakan bahawa dengan kehadiran satu pihak ketiga bererti wujud 'some other reason' untuk memerintahkan satu perbicaraan. Prosiding pihak ketiga adalah prosiding bebas di antara si defendan selaku plaintif dan si pihak ketiga selaku defendan, dan suatu kenyataan oleh defendan bahawa dia berhak untuk digantirugi oleh satu pihak ketiga bukanlah jawapan kepada tuntutan plaintif dalam satu permohonan A. 14, kecuali tuntutan plaintif tersebut sudahpun di bayar oleh pihak ketiga itu.

[2] Di mana fraud atau ketidakjujuran adalah material, ianya mesti diplid dengan jelas, jika tidak secara 'explicit', maka hendaklah dalam terma-terma yang tidak meninggalkan apa-apa kekaburan munasabah tentang apa yang didakwa. Untuk memplid, sebagaimana yang dibuat oleh defendan, bahawa kedua-dua resit simpanan tetap telah dikeluarkan tanpa autoriti sah atau secara yang memfraudkan defendan, adalah tidak mencukupi. Ianya mengikut bahawa hujah bahawa dakwaan fraud telah diplid dengan secukupnya dalam pembelaan defendan adalah tidak bermerit.

[3] Mahkamah rayuan jelas tidak membincangkan isu pemegang amanah konstruktif. Walau apa pun, hakim Mahkamah Tinggi yang bijaksana adalah betul dalam memutuskan bahawa persoalan pemegang amanah konstruktif seperti yang diplid adalah satu isu substantif undang-undang yang memerlukan pemeriksaan teliti. Adalah jelas bahawa kausa tindakan alternatif yang menyatakan bahawa defendan adalah bertanggungan selaku pemegang amanah konstruktif kepada Majlis untuk wang yang disimpan itu adalah persoalan yang memerlukan satu perbicaraan penuh. Bebannya adalah terletak ke atas Majlis untuk membuktikan bahawa defendan adalah 'in breach of their contractual duty of care' kepada Majlis.

[4] Terdapat keadaan-keadaan dalam kes semasa yang membentuk 'some other reason to be a trial'. Pertama, bebannya adalah ke atas Majlis untuk membukti tuntutan mereka, dan barang diingat bahawa undang-undang berkaitan pemegang amanah konstruktif dalam konteks perhubungan banker/customer adalah agak 'complicated' dan bersifat teknikal, yang bermakna, sesuatu tuntutan yang didasarkan kepadanya hanya boleh dibuktikan secara teratur melalui keterangan lisan. Selanjutnya, keterangan berhubung dua resit simpanan tetap No. 209431 dan 209451 yang dikemukakan dalam perbicaraan bekas Presiden Majlis mungkin mempengaruhi kes semasa. Resit-resit tersebut boleh menjadi amat penting kepada pembelaan defendan dan ianya adalah 'desirable', demi kepentingan keadilan, bahawa defendan diberi segala peluang untuk memeriksa sepenuhnya rekod prosiding jenayah berkenaan.

[Rayuan dibenarkan; perintah Mahkamah Rayuan diketepikan; defendan diberi kebenaran tak bersyarat untuk membuat pembelaan terhadap tindakan.]

Case(s) referred to:
Barnes v. Addy [1874] 9 Ch App 244 ***(cit)***
Concentrate Engineering Pte Ltd v. United Malaysian Banking Corp Bhd [1990] 3 MLJ 1 ***(refd)***
Gemeinwirtschaft v. City of London Garages [1971] 1 All ER 541 ***(refd)***
Hua Hung Furniture v. Yusuf Dor [1993] 3 CLJ 31 ***(refd)***
Lipkin Gorman v. Karpnale Ltd [1987] 1 WLR 987 ***(cit)***
Mat Abu Man v. Medical Superintendent, General Hospital Taiping, Perak & Ors [1989] 1 CLJ 137 ***(refd)***
Miles v. Bull [1968] 3 All ER 632 ***(refd)***
Ng Kim Hwa v. Ng See Chow & Ors [1993] 2 MLJ 155 ***(refd)***
Thorne v. Steel [1878] WN 215 ***(foll)***

Legislation referred to:
Penal Code, s. 409
Rules of the High Court 1980, O. 14 rr. 1, 3
Rules of the Supreme Court 1965 UK, O. 14 r. 3

Other source(s) referred to:
Bullen & Leake & Jacob's Precedents of Pleadings, 13th edn, p 92
Summons For Third Party Proceeding (Form 26)
The Supreme Court Practice, 1997, vol 1, para 14/3 - 4/2, p 156

For the appellant - Siew Yew Ming (Ong Ming Suan with him); M/s Raja Eleena Siew Ang & Assoc
For the respondent - Sagadeva; M/s Saga & Assoc

[Appeal from Court of Appeal, Johor Bahru; Civil Appeal No. J-02-321-1995]

Reported by WA Sharif

JUDGMENT

Mohamed Dzaiddin FCJ:

This was an appeal of United Merchant Finance Bhd., the defendants in the High Court, against the decision of the Court of Appeal given on 22 July 1996, allowing an appeal of the plaintiffs, Majlis Agama Islam Negeri Johor (hereinafter referred to as "the Majlis"), from the decision of the High Court Johor Bahru, given on 29 April 1995, dismissing their application for summary judgment against the defendants under O. 14 r. 1 RHC 1980. Leave to appeal to this court was granted on 28 July 1997, but without any specific issues formulated.

We heard the appeal on 18 November 1998. After hearing counsel, we allowed the appeal with costs, set aside the order of the Court of Appeal and granted the defendants unconditional leave to defend the action. We now give our reasons.

The Court Proceedings

By their statement of claim dated 5 January 1994, the Majlis claimed against the defendants a sum of RM1 million together with interest thereon at the rate of 8% per annum from November 1985 till the date of full payment. The Majlis averred that on or about 2 November 1985 they had deposited a total sum of RM1 million by way of fixed deposit with the defendants' branch at No. 87-88, Jalan Rahmat, Batu Pahat, Johor. The latter acknowledged receipt of the deposited sum and issued to the Majlis two fixed deposit receipts of RM500,000 each in the name of "Pengerusi Jawatankuasa Zakat dan Fitrah" maturing on 2 February 1986. The fixed deposits were renewed on various dates between 2 February 1986 and 18 August 1987, the last expiry date being 2 February 1988. On 30 January 1988, the Majlis demanded the refund of the said sum of RM1 million with interest, but the defendants failed to comply. The Majlis contended that the defendants were liable under the two fixed

deposit receipts to refund the RM1 million with interest and added that they were entitled to assume that all things connected with the transactions and pertaining to the fixed deposits had been validly done upon the issuance of the two fixed deposit receipts by the defendants' branch. Alternatively, they contended that the defendants by accepting the said deposit of RM1 million were constructive trustees of the said fund for and on behalf of the Majlis.

On 14 April 1994, the defendants entered an appearance and on the same date filed a defence, denying the Majlis's claim. The defendants denied as follows:

(1) that the Majlis had deposited RM1 million in fixed deposit with the defendants;

(2) that the defendants had received the RM1 million from the Majlis and issued two fixed deposit receipts. Further and/or in the alternative, the defendants claimed that the fixed deposit receipts were issued without due authority of the defendants and/or issued in fraud of the defendants, and therefore were null and void and unenforceable against the defendants;

(3) that the fixed deposit receipts were renewed as alleged; and

(4) that they were constructive trustees for the said deposit for and on behalf of the Majlis.

On 7 June 1994, the Majlis filed the O. 14 summons for summary judgment against the defendants supported by an affidavit of their President, Dato' Haji Lokman Thany, affirmed on 28 May 1994. These were served on the defendants' solicitors on 14 July 1994. The defendants, however, took time to respond which they finally did by filing an affidavit in opposition affirmed on their behalf by Chuah Ai Huah on 3 February 1995 and duly served on the Majlis's solicitors on 6 February 1995. It is common ground that the Majlis's O. 14 application was filed about 23 days after the defendants filed the defence on 14 April 1994. The defendants were equally late in filing their affidavit in opposition to the Majlis's application. This issue was, however, resolved during the O. 14 hearing on 9 February 1995 when the learned trial judge rejected the defendants' affidavit in opposition.

High Court Decision

On 29 April 1995, the learned judge dismissed the Majlis's summons for summary judgment. His Lordship held that the defendants had succeeded "in establishing *bona fide* triable issues to defeat the O. 14 application." He found that constructive trustee (pleaded in para. 6 of the statement of claim) and fraud (pleaded in paras. 5 and 6 of the defence) were substantive legal issues which required close investigations and in the interest of justice, there should be a trial. On the issue of constructive trustee, his Lordship relied on *Lipkin*

Gorman v. Karpnale Ltd [1987] 1 WLR 987 where Alliot J laid down a principle of law that where a banker knowingly assisted a customer in committing a breach of trust, the banker became liable as a constructive trustee and *Barnes v. Addy* [1874] 9 Ch. App. 244 which established a two-fold classification of constructive trust, which is "knowing receipt" and "knowing assistance". He stated that the above principles would come into play in the instant case in the context of a relationship between a banker and customer and these could only be ventilated through witnesses at the trial. On the issue of fraud, his Lordship reasoned that fraud was raised by the defendants as a defence in para. 5 of the defence.

His Lordship summed up his finding as follows (p. 57 Rekod Rayuan):

> From the facts, this is certainly not a plain and straight forward case. It is devious and crafty and a trial is the best solution (*Miles v. Bull* [1968] 3 All ER 632). Put in another way, this is a complicated case and it is desirable that if the plaintiff is to get judgment it should be after a trial. This by itself constitutes "some other reason" (*Bank Gemeinwritschoft v. London Garages* [1971] 1 WLR 149).

However, as a postscript, his Lordship noted that the defendants had issued a third party notice on MUI Continental Insurance Sdn Bhd seeking an indemnity from the latter against the Majlis's claim of RM1 million. In his view, the presence of the third party to the present action came within the ambit of "some other reason" to warrant a trial. With respect, we do not think this is correct because third party proceedings are independent proceedings between a defendant as plaintiff and a third party as defendant (*Mat Abu bin Man v. Medical Superintendent, General Hospital Taiping, Perak & Ors.* [1989] 1 CLJ 137; [1989] 1 MLJ 226 SC). Secondly, the determination of the question in the third party proceedings has to await the determination of the issues in the plaintiff's action against the defendant (See: *Ng Kim Hwa v. Ng See Chow & Ors.* [1993] 2 MLJ 155). See also *Summons for Third Party Proceedings* (Form 26) which stipulates:

> And that the question of the liability of the said third party to indemnify the defendant be tried at the trial of this action, but **subsequent thereto.** [Emphasis added].

It should also be noted that any statement by a defendant that he is entitled to be indemnified by a third party is no answer to the plaintiff's claim in an O. 14 application, unless the third party has discharged the plaintiff's claim (*Thorne v. Steel* [1878] WN 215 CA). See *The Supreme Court Practice* 1997 Vol. 1 para 14/3 - 4/2 p. 156.

Proceedings In The Court Of Appeal

The Court of Appeal did not find favour with the findings of the High Court. In allowing the Majlis's appeal, Dato' Shaik Daud, HMR, delivering the judgment of the court, stated (at p. 21 Rekod Rayuan):

> In their Statement of Defence the respondent made a total denial of all the appellant's averment in their Statement of Claim and had pleaded in the alternative that if the fixed deposit receipts were issued, they were issued to defraud the respondent and therefore null and void and unenforceable. Apart from this denial and the bare assertion that there was fraud, the Statement of Defence did not provide any other particulars. Based on this defence, the learned Judge found that there is an issue or question in dispute which ought to be tried or that there ought for "some other reason" to be a trial.
>
> On going through the pleadings as it stood at the Order 14 hearing, we are at a loss as to what the learned Judge meant when he said that the respondent took pains to satisfy the court that there ought for some other reason to be a trial. As mentioned earlier the learned Judge was left with only the pleadings to decide whether summary judgment can be entered.
>
> On our perusal of the Statement of Defence, we find that it merely consisted of bare denials and a bare assertion of fraud, without condescending to any particulars. Under such circumstances we cannot accept the learned Judge's finding that the respondent had "succeeded in establishing a *bona fide* triable issue to defeat the Order 14 application".

His Lordship concluded (at p. 25):

> The learned Judge appeared to have considered matters which are not in the Statement of Defence when he said that the case "is devious and crafty and a trial is the best solution" and further concluded, "this is a complicated case and it is desirable that if the plaintiff is to get judgment it should be after a trial. This by itself constitutes "some other reason". We find that all these findings are baseless. We find that this is a straight forward and an uncomplicated case where the respondent have not raised any credible defence to enable them to defend the appellant's claim, and it is a fit and proper case to order summary judgment under Order 14. We, therefore, allowed the appeal, set aside the learned Judge's order and entered summary judgment in favour of the appellant as claimed. We also ordered that the deposit be refunded to the appellant.

Appeal To This Court

At the outset of the appeal, Encik Siew, counsel for the defendants informed us that the Federal Court Criminal Reference No. 06-3-1994 *(Dato' Rahmat bin Asri lwn. Pendakwa Raya)* had a direct bearing on the appeal. The Criminal Reference concerned the conviction and sentence of Dato' Rahmat Asri, the

Majlis's former President who was charged for criminal breach of trust (under s. 409 Penal Code) in respect of RM1 million being the sum allegedly deposited by the Majlis at the defendants' branch at Batu Pahat. As a result of a search at the Federal Court registry, it was established the two fixed deposit receipts No. 209431 and 209451 which formed the subject matter in the present case were the same exhibits in the criminal trial and exhibited in the Criminal Reference Appeal Record.

Counsel informed us that these facts were not known to the solicitors in the civil action. It only came to light at an earlier hearing of this appeal on 21 October 1997, when Dato' Peh Swee Chin, a member of the coram, informed the parties that the subject matter of this case under appeal could be connected with the Criminal Reference where he and Dato' Dzaiddin were panel members who heard the reference. The court then directed the parties to check the matter.

Encik Siew submitted that in light of the evidence concerning the two fixed deposit receipts which were material to the defendants and which both parties were unaware until after the search made at the Federal Court registry, the defendants should be given an opportunity to carry out further investigation and, if necessary, to apply for amendments of the Defence.

Counsel next submitted that the Court of Appeal erred in concluding that the defence consisted of bare denial of the Majlis's claim and bare assertion of fraud. He contended that the defence did not consist of bare denial, but contained what he called "multi-barelled Defence" as pleaded in paras. 3 to 7 of the defence. On fraud, he relied on paras. 5 and 6 which specifically stated that if the two fixed deposit receipts were issued (which was denied) they were not the receipts of the defendants and that the issuance and the renewals of these two receipts were made without the authority and in fraud of the defendants. In the circumstances, he concluded that the defendants had sufficiently explained in the defence how and why the alleged transactions were fraudulent to constitute a triable issue. Reliance was placed on a High Court decision in *Hua Hung Furniture v. Yusuf Dor* [1993] 3 CLJ 31, where para. 3 of the defence states:

> The defendant says that he did not sign any contract agreement with the plaintiffs in respect of the tenders mentioned in paragraph 1 of the statement of claim and in any event the defendant's signature and/or chop appearing on the contract agreement and other documents, which the defendant denies, then the defendant says that the said signature and/or chop has been forged, fraudulently put on, or fraudulently obtained and the transaction was a fraudulent transaction.

On appeal from the Sessions Court to the High Court Sibu, the learned High Court judge stated (at p. 33):

> Quite clearly therefore, the defendant, who is the respondent in this appeal, is contending that the alleged transaction between him and the appellant was fraudulent as he did not sign or execute the agreements referred to by the appellant and that the signatures and chop marks therein had been forged. In my view, paragraph 3 above can clearly be construed as alleging that the transaction alleged to exist between the appellant and respondent was a fraudulent one by reason of the fact that the respondent never signed the documents alleged to constitute such transaction and furthermore, the said documents contained signatures and chop marks which were forged. To that extent therefore, the pleading does explain how and why the alleged transactions was fraudulent. In the circumstances, I do not agree with the learned Judge's conclusion that the allegation of fraud in the statement of defence was a bare one unsupported by particulars.

Encil Siew also submitted that the Court of Appeal erred in law in failing to consider the issue of constructive trustee when concluding that the learned trial judge appeared to have considered matters not in the pleadings. Counsel contended that this issue was raised in the statement of claim and was sufficiently dealt with by the trial judge for him to arrive at his conclusion that it was a substantive legal issue which required close investigation.

It was finally submitted that having regard to the circumstances of the case as a whole, the learned judge was justified in concluding that the case was devious and crafty which by itself constituted "some other reason" for a trial under O. 14 r. 3 RHC 1980.

Conclusions

1. Defence of fraud

On counsel's submission that the defence did not consist of bare allegation of fraud but the defendants had sufficiently explained it in the defence, it is a settled rule of practice that where fraud or dishonesty is material, this must be clearly pleaded, if not explicitly, then in such terms that the reader of the pleading can be left in no reasonable doubt what is being alleged. Further, where an element in the alleged fraud or dishonesty relied on is the other party's knowledge of a given fact or state of affairs, this must be explicitly pleaded (*Lipkin Gorman v. Karpnale Ltd.* [1989] FLR 137; [1992] 4 All ER 409 CA). In the instant case, we can only look at the defence since the supporting affidavit was rejected by the trial judge. On this basis, it is clear to us that paras. 5 and 6 of the defence do not condescend to particulars of the alleged fraud. Merely pleading that even if the two fixed deposit receipts

were issued and renewed (which the defendants denied) and that they had been done so without due authority and/or in fraud of the defendants is not enough. The defendants must state with sufficient particularity the circumstances how the two fixed deposit receipts were allegedly issued in fraud of the defendants. For the above reason and in the light of the principles of pleading which must be duly observed, we cannot agree with counsel's contention that the defence contains a sufficient plea of fraud.

2. Constructive Trustee Issue

On counsel's submission that the Court of Appeal failed to consider the Majlis's alternative cause of action that the defendants were liable as constructive trustees for the deposited amount, we note there was no discussion on this point in the judgment of the Court of Appeal. The learned High Court judge, however, found that the constructive trustee point pleaded in para. 6 of the statement of claim was a substantive legal issue which required close investigations and in the interest of justice, there should be a trial. We agree with the trial judge's conclusion, although we would observe that para. 6 of the statement of claim lacks particulars. For a proper pleading on a claim against a bank/financial institution as a constructive trustee, see: *Bullen & Leake & Jacob's Precedents of Pleadings*, 13th ed. p. 92.

It is clear to us that the alternative cause of action that the defendants were liable as constructive trustees to the Majlis for the deposited amount requires a full trial of the matter. The onus is on the Majlis to prove that the defendants were in breach of their contractual duty of care to the Majlis. In *Lipkin Gorman v. Karpnale Ltd. & Anor supra*, the English Court of Appeal (Nicholls LJ dissenting), reversing Alliot J's decision, held, *inter alia*, that a bank could not be liable as a constructive trustee to its customer unless it was in breach of its contractual duty of care to the customer. Parker LJ (*ibid.*, at p. 173) stated that the bank could not have rendered itself liable as constructive trustee unless it was also liable for a breach of contract and that if it was not liable for breach of contract it could not be liable as constructive trustee. Thus, in the instant case, the Majlis should be put to strict proof of their alternative claim.

3. Whether The Circumstances Of The Case Constitute "Some Other Reason To Be A Trial"?

Order 14 r. 3 RHC 1980 states:

> (1) Unless on the hearing of an application under rule 1 either the Court dismisses the application or the defendant satisfies the Court with respect to the claim, or the part of a claim, to which the application relates that there is an issue or question in dispute which ought to be tried or **that there ought**

> **for some other reason to be a trial of that claim or part,** the Court may give such judgment for the plaintiff against that defendant on that claim or part as may be just having regard to the nature of the remedy or relief claimed. [Emphasis added].

Our Order 14 r. 3 is in *pari materia* with the English RSC 1965 O. 14 r. 3. There are several authorities which considered the scope of the words "some other reason to be a trial". In *Miles v. Bull* [1968] 3 All ER 632, the defendant and her husband had separated, but the former was in occupation of the matrimonial home which was sold by the husband to the plaintiff. The plaintiff then brought an action claiming possession of the property and applied for summary judgment. The master gave the defendant unconditional leave to defend. The plaintiff's appeal was dismissed. Megarry J found that nearly all the relevant facts were under the control of the plaintiff and the defendant would have to seek to elicit by discovery, interrogatories and cross-examination those facts which would assist her (the defendant). His Lordship reasoned that if the defendant could not point to a specific issue which ought to be tried, but nevertheless satisfied the court that there were circumstances that ought to be investigated, then the words "there ought for some reason to be a trial" would be invoked.

At p. 637, his Lordship explained:

> Under r. 3 and r. 4 of the present R.S.C., Ord. 14, the defendant can obtain leave to defend if (and I read (13) from r. 3(1)) the defendant satisfies the court "that there is an issue or question in dispute which ought to be tried or that there ought for some other reason to be a trial". These last words seem to me to be very wide. They also seem to me to have special significance where (as here) most or all of the relevant facts are under the control of the plaintiff, and the defendant would have to seek to elicit by discovery, interrogatories and cross-examination those which will aid her. If the defendant cannot point to a specific issue which ought to be tried, but nevertheless satisfied the court that there are circumstances that ought to be investigated, then I think those concluding words are invoked. There are cases when the plaintiff ought to be put to strict proof of his claim, and exposed to the full investigation possible at a trial; and in such cases it would, in my judgment, be wrong to enter summary judgment for the plaintiff. In the present case the plaintiff's evidence initially consisted of a single affidavit in which brevity could scarcely be carried further. He has now amplified this by further evidence, but this is certainly not exhaustive or conclusive. The words "there ought for some other reason to be a trial" seem to me to give the court adequate powers to confine R.S.C., Ord. 14, to being a good servant and prevent it from being a bad master. If I may adapt the language of LORD PARKER OF WADDINGTON in *Daimler Co., Ltd v. Continental Tyre and Rubber Co. (Great Britain), Ltd.* (14), referred to in the notes to R.S.C., Ord. 14, in THE SUPREME COURT PRACTICE 1967 (15), if the circumstances of the case

a are "such as to require close investigation", this will "preclude the propriety of giving leave to sign judgment under Ord. 14, r. 1". The question is thus whether this is such a case.

I think it is. In my judgment "there ought for some other reason to be a trial"; and the reason is that of justice. By carrying through a transaction at unusual b speed the defendant's husband is seeking to enable the plaintiff to do what he himself cannot do, namely, evict the defendant from her home. The husband has whatever rights the law gives him, and so has the plaintiff; but in the circumstances of the case I do not think it would be just if the plaintiff were able to enforce the rights that he claims without being put to strict proof that they do enable him to evict the defendant. I was told that in granting leave to c defend Master JACOB said that the case was "too near the bone for Ord. 14". That, if I may say so, seems to me to summarise admirably what I have tried to express in greater detail. R.S.C. Ord. 14, is for the plain and straight-forward, not for the devious and crafty. There is here a case for investigation, and so not for summary decision.

d I also bear in mind what BRAMWELL, L.J., said in *Harrison v. Bottenheim* (16). Even on the old wording of R.S.C., Ord. 14,

> though a man cannot show a defence, still, if he has shown enough to entitle him to interrogate the plaintiff, the case is not within Ord. 14, and should not be pursued without his being allowed to defend.

e In *Gemeinwirtschaft v. City of London Garages* [1971] 1 All ER 541, the English Court of Appeal followed *Miles v. Bull* and found there was nothing in the case which fell within those words in O. 14 r. 3 referred to above. However, Cairns LJ delivering the full judgment of the Court made the f following observation (at p. 548):

> It is not difficult to think of other circumstances where it might be reasonable to give leave to defend although no defence was shown, eg if the defendant was unable to get in touch with some material witness who might be able to provide him with material for a defence; or if the claim were of a highly g complicated or technical nature which could only properly be understood if oral evidence were given; or if the plaintiff's case tended to show that he had acted harshly and unconscionably and it was thought desirable that if he was to get judgment at all it should be in the full light of publicity.

In *Concentrate Engineering Pte Ltd. v. United Malaysian Banking Corp. Bhd.* h [1990] 3 MLJ 1, the plaintiffs were customers of the defendants who were bankers. Several cheques apparently drawn on the plaintiffs' account ('the cheques') were paid out by the defendants who then proceeded to debit the plaintiffs' account. The plaintiffs started the present action claiming that the defendants had wrongly paid out on the cheques. Their application for i summary judgment was dismissed and they appealed. The cheques were

duplicate copies fraudulently printed with the same serial numbers as the genuine and unused cheques supplied by the defendants. The signatures on the cheques were declared by expert evidence to have been traced from genuine signatures. The question before the Singapore High Court was whether the circumstances were such that the defendants ought, in the interest of justice, be given time and with it the opportunity to investigate further the fraud by whatever means that were available to them, including a trial, to determine for themselves whether they were liable as bankers.

Following *Miles v. Bull*, Chan Sek Keong J (as he then was) held that the circumstances in which and the sheer audacity with which the fraud was carried out and the absence of an explanation by the directors of the plaintiffs constituted "some other reason" for a trial.

In the present appeal, there are circumstances which, in our opinion, constitute "some other reason to be a trial". First, although the defendants barely denied that they were constructive trustees for the deposited amount for and on behalf of the Majlis, the onus was on the Majlis to prove their claim. Indeed, on the authority of *Lipkin Gorman*, the law on constructive trustee in the context of banker/customer relationship is quite complicated and technical in nature, and that being so, a claim based on it could only be properly proved by oral evidence. Secondly, the evidence about the two fixed deposit receipts No. 209431 and 209451 disclosed at the criminal trial of the Majlis's former President, Dato' Rahmat, may have a bearing on the present case. Needless to say the two fixed deposit receipts are crucial to the defendants' entire defence in the case. Both parties were unaware of the criminal proceedings until, as we have said, counsel were put to notice at one of the earlier hearings of this appeal. Therefore, in the interest of justice, it is desirable that the defendants be given every opportunity to examine fully the record of the criminal proceedings, which inevitably may provide them some materials for their defence.

Result

It is for the above reasons that we allowed the appeal with costs, set aside the order of the Court of Appeal and granted the defendants unconditional leave to defend the action.

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